IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-433

CHARLES BEN HOWELL, Suing on behalf of himself and all other persons similarly situated, as a class,

Petitioners,

vs.

DALLAS BAR ASSOCIATION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT DALLAS BAR ASSOCIATION IN OPPOSITION

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LIST OF AUTHORITIES

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QUESTIONS PRESENTED

The Petition for Certiorari sets out that the decisions below present only two questions for review. In fact, there were several independent bases for the District Court's dismissal of Plaintiffs' Complaint and the affirmance of that dismissal by the Fifth Circuit. The questions for review are:

1. Whether the Constitution requires the Court of Appeals to write opinions in all cases which it decides;

2. Whether a judge is immune from suit under 42 U.S.C. §§1983 and 1985 for acts taken in his official capacity;

3. Whether there is a constitutionally protected right to be a candidate for a state judicial office; and

4. Whether Plaintiff's Complaint stated a cause of action under 42 U.S.C. §§1983 and 1985 against the Dallas Bar Association.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct. However, Petitioner has omitted the fact that the Fifth Circuit affirmed the District Court's opinion after hearing oral argument by Petitioner and Respondents.

ARGUMENT

Petitioner failed to convince either the District Court or the Court of Appeals that his loss of an election for state district judge was the result of a conspiracy among the Respondents hereto which constituted a deprivation of his constitutionally protected rights. He now attempts to convince this Court that there are special and important reasons to grant certiorari in this case. Respondent Dallas Bar Association (hereinafter sometimes called "DBA") respectfully submits that if the issues raised by Petitioner warrant review by this Court, such review should be deferred until such issues are presented to the Court in a case in which they are determinative and their resolution crucial, rather than gratuitous.

In this case, the Fifth Circuit affirmed without opinion an order of dismissal and unpublished memorandum opinion of

the District Court dismissing Plaintiff's Complaint for "any one of several reasons." (P.A. 19.) Local Rule 21 of the Fifth Circuit provides that an order may be affirmed without opinion when no error of law appears and an opinion would have no precedential value. Petitioner is undoubtedly correct in his assumption that the decision of the Fifth Circuit to omit an opinion in this case was based on this portion of the Rule. Petitioner does not point to any error of law which would compel reversal of the decision of affirmance. Rather, Petitioner claims that due process requires an appellate court to indicate the grounds for its ruling "save, perhaps, in a completely pedestrian situation." (Petition at p. 27.) This Court has previously determined that, with respect to summary affirmances, the Courts of Appeals should have wide latitude in their decisions of whether or how to write opinions. *Taylor v. McKeithen*, 407 U.S. 191, 194, n.4 (1972); see also, *Lego v. Twomey*, 404 U.S. 477, 480, n.6 (1972).

Factor (4) of Rule 21 was intended to cover a broad group of cases. The rule is not by its terms or its interpretation limited to pedestrian situations. Where a trial court has correctly analyzed complex factual and legal issues, it is a waste of limited judicial resources to require an appellate court to do more than give the district court due credit for the merit of its opinion with a summary affirmance. Such a procedure is constitutionally, procedurally and economically sound.

The second issue Petitioner presents for review was but one of several reasons for the dismissal of his Complaint. The Dallas Bar Association concurs with the implicit finding of the Court of Appeals that the District Court was correct in holding that under the circumstances alleged in Plaintiff's Complaint, the defendant judges were immune from Plaintiff's alleged causes of action under 42 U.S.C. §§1983 and 1985. However, this holding is not essential to uphold the

dismissal of this Respondent, nor to affirmance of the dismissal of Plaintiff's entire Complaint, because the issue of judicial immunity was but one of several independent grounds for dismissal. Thus, reversal of this holding alone would not affect the dismissal of the cause and would be in the nature of an advisory opinion.

Petitioner suggests that certiorari should be granted in this case to review the issue of judicial immunity because *Sparkman v. McFarlin*, 552 F.2d 172 (7th Cir. 1977), cannot be reconciled with *McAlester v. Brown*, 469 F.2d 1280 (5th Cir. 1972). There is, however, no conflict between the principles of judicial immunity relied on by the courts in those two cases. They are merely examples of the common phenomenon that application of the same principle to different fact situations may result in diverse holdings. Even if the two cases were in conflict, that certiorari should be granted in this case simply because the District Court's opinion cites *McAlester* is a non sequitur. The proposition for which it is cited, "that even though a judge acts maliciously, so long as the action is taken under the sheltered zone of judicial jurisdiction, the judge can suffer no liability for the acts taken," is both correct and consistent with *Sparkman*. (P.A. 20.) The court's decision herein does not depend on a disputed proposition of law, but on its finding that actions taken by a state judge to protect the integrity of the state courts give rise to immunity. Neither the interest of the parties hereto nor the interest of the public would be furthered by a decision of this Court to follow the District Court and Fifth Circuit to that conclusion through the maze of Petitioner's conclusions and allegations.

The Petition for Certiorari should be denied in this case because there has been no departure by the Fifth Circuit from the usual course of judicial proceedings; there is no conflict

between this decision and the decision of another Court of Appeals on the same matter; there is no important question of Federal law requiring decision by this Court; and the decisions below were clearly correct.

I.

AFFIRMANCE BY THE FIFTH CIRCUIT WITHOUT OPINION WAS PROPER

In *Taylor v. McKeithen*, 407 U.S. 191 (1972), both the majority and dissenting opinions recognized the propriety of summary affirmances by the Courts of Appeals, with specific reference to the Fifth Circuit. The caseload of the Courts of Appeals has resulted in the adoption, by necessity, of summary procedures by most of the Circuits. See *Jones v. Superintendent, Va. State Farm*, 465 F.2d 1091 (4th Cir. 1972); *E. W. Bliss Co. v. U.S.*, 351 F.2d 449 (6th Cir. 1965); *Cook v. Hirschberg*, 258 F.2d 56 (2d Cir. 1958); 14 Cycl. of Federal Procedure §68.115 (3 Ed. 1965 rev. vol.). The adoption of procedures like that challenged by Petitioner herein has been sanctioned and, indeed, encouraged by this Honorable Court. Burger, Report on Problems of the Judiciary, 92A Sup. Ct. 2921 (Aug. 14, 1972).

Petitioner urges that it is necessary that the Supreme Court implement standards and guidelines concerning the disposition of cases without opinions by the Courts of Appeals. In support of his Petition, he claims that the Fifth Circuit has failed to refine the principles governing the use of its Local Rule 21 and likewise failed to implement procedures "whereby any tendency toward improvident use of the rule may be checked." (Petition at p. 30.) In *NLRB v. Amalgamated Cloth. Wkrs. of Amer., NFL-CIO, L. 990*, 430 F.2d 966 (5th Cir. 1970), Chief Judge John R. Brown discussed in detail the guidelines and procedures which the

court uses in applying Local Rule 21. In order to dispense with an opinion, a unanimous decision of the three judges comprising a panel is required. This requirement alone is sufficient to protect against improvident use of the rule. In *Huth v. Southern Pacific Co.*, 417 F.2d 526 (5th Cir. 1969), Judge Brown emphasized the protection afforded a litigant by the same kind of unanimity requirement in the context of assignment of cases to the summary calendar.

In this case, the court afforded the Petitioner the opportunity for oral argument. Thus, this case has gone through initial screening by the court to determine whether it should be placed on the summary docket, oral argument and a second screening process to determine the propriety of dispensing with an opinion. The unanimous decision to dispense with an opinion, therefore, was made by judges familiar with the case and with their duty to carefully and selectively employ Rule 21. Opinion writing, like the allowance of oral argument, is a matter of discretion and not a matter of absolute right. Cf. *Torzillo v. Goldmann*, 190 F.Supp. 504 (D. N.J. 1961), aff'd 293 F.2d 273, *cert. denied* 368 U.S. 991. It is well established that matters resting in a court's discretion will not be reviewed unless such discretion has been clearly and prejudicially abused.

A clear abuse of discretion would exist here only if Petitioner were correct in positing that Local Rule 21 can be applied only to routine and repetitious cases. Contrary to Petitioner's contentions, the rule, by its terms and as interpreted by the Fifth Circuit in the *Amalgamated* case, does not by design or use apply only to the "completely pedestrian situation." Rather, the rule applies to any case which falls within one or more of the four classifications defined by the rule and in which, in the opinion of the three judges comprising the panel, an opinion would have no

precedential value. That an appellant presents numerous questions to the court in a case with a complex and unique fact situation does not preclude summary treatment. The standard that no error of law appears in analogous to the rule followed in the Sixth Circuit in its summary affirmances:

> It has been stated on several occasions over the years that it is not the policy or practice of this court in reviewing cases on appeal where a district court has rendered a comprehensive opinion with which we find ourselves in full agreement, to rewrite such an opinion and, in a sense, deprive the trial court of the credit of its careful consideration of the issue and arguments, and complete determination of the cause. *E.W. Bliss Co. v. U.S., supra* at 451.

Once the court has determined that no error of law has been made by the district court, if an opinion would have no precedential value, the court can clearly exercise discretion to refrain from writing an opinion, regardless of the number or complexity of issues raised in a case.

One has only to read Plaintiff's Complaint to ascertain that the case at hand is unusual, if not bizarre. The Fifth Circuit held that the case was correctly dismissed by the District Court on the pleadings for reasons set forth in the unpublished memorandum opinion of that court. It seems indisputable that the affirmance of a dismissal on the pleadings of such a unique case is a situation in which an opinion would have no precedential value. This is particularly true where the District Court's opinion is unpublished. The history of this case and the companion cases cited by Petitioner are ample evidence that the resolution of this case is of interest and importance to no one other than the parties, and the decision to dispense with an opinion was not a clear abuse of discretion.

Petitioner's avowed feelings of emptiness, frustration and outrage at the summary affirmance of his appeal do not constitute the kind of prejudice which would compel review of the court's decision, even if there had been a clear abuse of discretion. Petitioner has ascertained that the Fifth Circuit affirmed the case for the reason that there was no error of law in the opinion of the District Court. Petitioner had the benefit of the District Court's memorandum opinion and the briefs and oral arguments of Respondents to illuminate for him the law on which this decision was based. This Respondent questions whether a repetition of that law in an opinion by the Fifth Circuit would have dispelled his conclusion that the decision was based on bigotry and bias, for even now, Petitioner does not ask simply that the panel deciding his case give the reasons for its affirmance. He requests instead that he be given an opportunity for a second appeal on all issues presented to the Fifth Circuit, even though he presents only one alleged error to this Honorable Court. His request impugns the integrity of the Honorable Judges who heard and decided his case on appeal and is a transparent attempt to transform his petition for certiorari into the grant of a second opinion by the Fifth Circuit, without regard to the merits of the first.

II.

THERE IS NO CONFLICT BETWEEN THE AFFIRMANCE IN THIS CASE AND THE OPINION OF ANY OTHER CIRCUIT COURT

In its memorandum opinion, the District Court cites *McAlester v. Brown*, 469 F.2d 1280 (5th Cir. 1972), in holding that Petitioner failed to state a claim against the defendant judges because their acts fell within the sheltered zone of judicial jurisdiction. Petitioner suggests that certiorari

should be granted in this case because of the purported conflict between *McAlester* and *Sparkman v. McFarlin*, 552 F.2d 172 (7th Cir. 1977). Respondent suggests that there is no conflict between the two cases and, that even if there were such a conflict, review of this case is neither necessary nor appropriate to its resolution.

In *Sparkman*, the Seventh Circuit determined that the defendant judge had acted extrajudicially in ordering sterilization of the plaintiff and, because of the total lack of jurisdiction for his order, judicial immunity was not applicable. In *McAlester*, the Fifth Circuit determined that the defendant judge was immune from liability in a civil rights action growing out of a contempt proceeding. The decision was based on the court's findings that the case involved a normal judicial function; that the incidents giving rise to the action occurred in the judge's chamber; that the controversy centered around a pending case; and that the controversy arose out of a visit to the judge in his official capacity. There was no finding in that case that the judge lacked jurisdiction either in the pending case or in issuing the ancillary contempt order. Thus, the apparent conflict between the two cases is only in the mind of Petitioner.

McAlester was cited by the District Court for the proposition that a judge is immune from liability for acts taken within the sheltered zone of judicial jurisdiction, even though he acts maliciously. Acts taken by a judge to protect the jurisdiction and integrity of his court through initiation of contempt proceedings and disciplinary action based on that contempt are not actions for which a judge has only a qualified immunity. The only facts which Petitioner alleged in his Complaint against either of the defendant judges in support of his cause of action show that his cause of action was based on a course of conduct initiated in connection with

and inextricably associated with incidents occurring during a hearing in the court of one of the defendant judges. There is no allegation that the judge lacked jurisdiction to cite Petitioner for contempt and Petitioner's attempt to state a cause of action against the judges in this case would be wholly unaffected by either a reversal or affirmance of *Sparkman*.

III.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

Neither question presented by Petitioner for review by this Court presents an issue of such public importance that it merits a grant of his Petition. While litigants have an interest in the procedures adopted by the various Courts of Appeals for screening and disposition of cases presented to them, unless the practices adopted by the respective courts infringe on constitutionally protected rights of the parties, the Courts of Appeals themselves are the appropriate forums for review of the procedures and their application. There is no basis for Petitioner's apparent contention that a written opinion on appeal in a civil case is constitutionally required. Petitioner protested to the Fifth Circuit the application of Rule 21 to this case through a petition for rehearing en banc, which was denied by the court. The appropriate forum, therefore, has already afforded Petitioner the review he seeks and has ratified the propriety of applying the no-opinion rule to this case. If this Court were to deem the application of screening and summary procedures to cases by Courts of Appeals grounds for granting a petition for certiorari, it might expect the number of such petitions to increase in proportion to the increasing use of screening and summary procedures by the Courts of Appeals. This Petitioner is certainly not unique in considering that his case is of sufficient importance to warrant not only oral argument but also a written opinion.

This Court has however recognized that the decision as to whether an opinion should be written properly rests not with the parties nor with this Court, but within the sound discretion of the Court of Appeals.

The specificity of Rule 21 and the built-in safeguards of the procedures adopted for its implementation provide adequate protection to litigants and adequate guidelines for the court. Such procedures are closely akin to those of this Court and have provided a model for other circuits of judicial efficiency and economy without the sacrifice of justice. The Fifth Circuit has set reasonable guidelines for the use of the no-opinion practice. Petitioner, in reality, does not seek guidelines from this Court, but instead seeks another review of the application of that practice to his individual case. Resolution of that question is of significance solely to the parties herein.

The second issue Petitioner asks this Court to review is the scope of judicial immunity to actions for damages. While this issue is of importance in the abstract, in the context of this case, its significance diminishes. The Court's decision on judicial immunity was not crucial to the holding of the District Court in this case. As set forth in the memorandum opinion, the Plaintiff's Complaint was subject to dismissal for failure to state a cause of action upon which relief could be granted because of Plaintiff's dual failure to show a conspiracy with the specificity necessary in a civil rights complaint and his failure to show a deprivation of Federal constitutional rights. Therefore, judicial immunity was but one of several reasons for the dismissal. Certiorari should not be granted to review an issue which is not determinative in the case before the Court.

Because this case was a dismissal on the pleadings, it is moreover a particularly poor vehicle for the exploration of the

scope of judicial immunity. Petitioner's alleged cause of action against the defendant judges is based in the first instance on incidents clearly related to a contempt order which the defendant judge had jurisdiction to enter. In the second instance, his allegations relate to the interest or participation of the two state court judges in his disciplinary proceedings based on his alleged contempt. The activities of the judges in connection with Petitioner's grievance proceedings, even if not immune, are nevertheless not actions which give rise to liability for deprivation of constitutional rights. The issue of judicial immunity *is* important. If it is to be reviewed by this Court, it should be reviewed in a case in which review is necessary both because the issue is determinative in the case and because the precedential value of the opinions of the courts below require clarification. Neither condition exists in this case.

IV.

THE DECISION BELOW IS CLEARLY CORRECT

The crux of this case is Petitioner's complaint that he did not win election to state judicial office. Petitioner has cited no case which stands for the proposition that there is a constitutionally protected right to be a candidate for or hold state office. Petitioner's citations to numerous cases involving voting rights, rights to assemble and rights of free speech are inapposite. It is axiomatic that in order to state a cause of action under either 42 U.S.C. §1983 or 42 U.S.C. §1985 a plaintiff is required to show deprivation of a constitutionally protected right. In light of Petitioner's failure to allege such deprivation, dismissal of his Complaint was proper. As set forth in the memorandum opinion of the district court, Petitioner also failed to set forth in his Complaint anything more than conclusory allegations insufficient to support a cause of action based on conspiracy under the Civil Rights Act.

Petitioner's attempts to state a cause of action against this particular Respondent are most tenuous. The Dallas Bar Association is a private organization and as such cannot act under color of state law for purposes of 42 U.S.C. §1983. Petitioner has not alleged any action taken by the association which was directed at him because of his association with a class rather than out of animosity toward him personally and his alleged cause of action under 42 U.S.C. §1985 therefore was equally without merit. His attempts on appeal to identify his claimed cause of action with cases holding private individuals or associations liable for interference with voting rights of identifiable classes under 42 U.S.C. §1985(3) are easily defeated by a reading of his Complaint. It is clear that Petitioner, despite all his protests, seeks to vindicate solely the interests of candidate Howell. Whatever the merits of his grievances against the Dallas Bar Association, they do not rise to a cause of action under the Civil Rights Act, nor does he allege otherwise to this Honorable Court.

Finally, Petitioner admits that his alleged cause of action against the defendant members of the Dallas County Grievance Committee was subject to dismissal based on *Imbler v. Pachtman*, 424 U.S. 409 (1976). He does not seek review of that portion of the decisions below; rather he asks for the opportunity to re-plead his Complaint to attempt to avoid the effects of that decision. (Petition, p. 16.) This request is the essence of Petitioner's appeal to the Fifth Circuit and of his Petition to this Court. Strip the verbiage, eliminate the inapposite analogies and irrelevant hypotheticals and what is left is an admission that dismissal of Petitioner's Original Complaint by the District Court was correct and a request that Petitioner be given the chance to try again, not just to plead his case, but to plead around the cases that dictated its dismissal. The grant of such a request is a luxury our judicial system cannot afford.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Brief of Respondent Dallas Bar Association have been furnished to Mr. Randy Taylor, 908 Main Bank Building, Dallas, Texas 75202, and Mr. Howard D. Pattison, 226 Lakewood Tower, Dallas, Texas 75214, attorneys of record for Petitioners; Mr. Robin P. Hartmann, 4444 First International Building, Dallas, Texas 75270, and Mr. Stan McMurry, 4200 Republic National Bank Tower, Dallas, Texas 75201, attorneys of record for Jerry L. Buchmeyer, and the Dallas County Grievance Committee; Mr. Ben Monning, Jr., P.O. Box 487, Wills Point, Texas 75169, attorney of record for Judge Snowden M. Leftwich; Mr. W. R. Sessions, 1100 Dallas Federal Savings Building, Dallas, Texas 75201, attorney of record for Judge Dee Brown Walker; on this 12th day of OCTOBER, 1977, in accordance with the requirements of Supreme Court Rule 33.

ROYAL H. BRIN, JR.

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